Supreme Court, U.S.
FILED

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No.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

ROBERT W. MITCHELL,
Petitioner

v.

JOHN G. RICHARDS, in his capacity as
CHIEF INSURANCE COMMISSIONER
for the STATE OF SOUTH CAROLINA,
Respondent

On Petition For Writ of Certiorari To The UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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42 pp

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QUESTIONS PRESENTED

I. Whether Robert W. Mitchell and Ronald McDaniel were entitled to have been appointed as Designated Agents for the South Carolina Reinsurance Facility in accordance with SC Code 38-77-590(a) and/or South Carolina Act 166, Section 29?

II. Whether South Carolina Code Section 38-77-590(c), (d), and (f) codified from Act 145 and Act 166 are in total or in part unconstitutional *per se*?

III. Whether the questions of Fundamental Constitutional Guaranty in Robert W. Mitchell's and Ronald McDaniel's complaints, rising out of Acts 145 and 166 and not out of Act 1177, have been properly considered, addressed and adjudicated?

IV. Whether Robert W. Mitchell and Ronald McDaniel, not being appointed because of classifications arising out of Acts 145 and 166, codified as cs 38-77-590(c) and (f)8 were denied equal protection under the 14th Amendment and the 5th Amendment after 101 similarly situated agents were appointed and relatives of designated agents are presently appointed without classification.

V. Whether a class monopoly has been raised by the statute controlling and by the actions and inactions of the Commissioner.

INDEX I A

TABLE OF CONTENTS

Page

Questions Presented I
Introductory Statement.....1
Opinions 1
Jurisdiction.....2
Questions Presented.....2
Statement..... 2 -10
Reasons for Granting Writ of Certiorari.....10 - 15
1. Fundamental Constitutional Protection..... 11
2. The Decision of the Court of Appeals is in error12
3. Question of Monopoly has not been answered ..15

Conclusion.....15

Appendix..... 17
Appendix I....South Carolina Code Section 38-77-590 17
Appendix II..Opinion of the United States District Court..20
Finding of Fact.....22 - 26
Conclusions of Law.....26 - 31
Opinion of the Fourth Circuit Court of Appeals..32 - 34

TABLE OF CITATIONS

CASES

16 C.J.S. Constitutional Law 82(1) ..... Page 17
16A C.J.S. Constitutional Law 494 ..... Pages 7, 12
Daily v New Britian Mach.Co., 512 A. 2d 893, 200 Conn 562
Page 6
Mulkey v Reitman, 64 Cal 2d 559, 50 Cal Rptr 881, 413 P2d

825, affd 387 US 369, 18 L Ed 2d 830, 87 S Ct 1627..Page 6
Mungo v Smith 347 S.E. 2d 514 (S.C. App 1986)....Page 8
*Supreme Court of Virgi*nia v Friedman, 108 S. Ct. 2260, 487 U.S. 59, 101 L.Ed.2d 56 Page 9
Silver v Garcia, 760 F.2d 33. Page 9
Barnard v Thorstenn, 109 S. Ct. 1294, 103 L.Ed.2d 559. Page 9
Shaw by Strain v Strackhouse 42 U. S. C. A. cs 1983 920 F. 2d 1135 Page 10
Carter v Sedgewich County, Kan. 42 U. S. C. A. 705 F. Supp 1474, rip vip 929 F. 2d 1501.(1988) Page 10
S.C. v McMaster 237 US 63, (1915*)* Page 11
Parrish v Lamm, 758 P. 2d 1356 Pages 11, 15
City of Louisville v Sebree, 214 S. W. *2d 248, 308* Ky 420 Page 12
State v Harris, 6 S.E. *2d* 854, 216 N.C 746, 128 A.L.R. 658 Page 12
Bautista v Jones, 155 P.2d 343, 25 Cal.2d 746. Page 12
Ladson v Hallihan 36 N.E. 2d 227, 377 Ill 187. Page 12
Reingold v Harper, 78 A.2d 54, 6 N. J. 182 Page 12
Prudential Property and Casualty v Insurance Commission of South Carolina 699 F. 2d 690, 692 (4th Cir. 1983) Page 13
State v Goolsby, 278 SC 52, 292 S.E. 2d 180.....Page 16
U.S. v Syufy Enterprises 903 F. 2d. 659 Page 16
Northern Pac. Ry. Co. v U.S. 1958, 78 S.Ct. 514, 518, 356 U.S. 1,5, 2 L. Ed. 2d 545 Page 16
U.S. v Socony Vacuum Oil Co Inc 1849-43 Trade Cases *56031 310 US* 150 60s ct 811..... Page 16
U.S. V Grinnell Corp. 563, 86 S. Ct 1698, 1704, 16L. Ed. 2d 778. Page 16
Davidson v. Kansas City Star Co. D.C. Mo., 202 F Supp. 613, 617. Page 17

ACTS OF THE SOUTH CAROLINA GEN. ASSEMBLY

Act 1177 ... (Exhibit 130)..... Page 2 and following
Act 166 .....(Exhibit 136) .....Page 3 and following
Act 145 .....(Exhibit 135).....Page 4 and following
Act 166 Sect 29 ...Page 10 and following
Act 155 ..... Page 11

Constitutional Provisions

United States Constitution, Article I, Section 10....Pages 3, 6

Statutes

42 U.S.C. 1983 and 1985..... Pages 5, 10
SC cs 38-77-590.....Appendix page 17, Page 5 and following
38-1-140(C).....Page 3
38-37-150.....Page 4 and following
38-77-590(a).....Page 7 and following
38-77-590(c).....Page 4 and following
38-77-590(f)..... ..... Page 6 and following

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PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

****

INTRODUCTORY STATEMENT

Robert W. Mitchell, *pro se,* on his own behalf , petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fourth District in this case.

OPINION BELOW

The opinion of the Court of Appeals has not been reported. The opinion of the District Court and the Court of Appeals is appended at Appendix II, *infra*, page 20, beginning page 21.

JURISDICTION

The judgment of the court of Appeals was entered on April 20, 1998. Petitioners timely petition for Rehearing with Suggestion for Rehearing en banc was denied May 26, 1998. The jurisdiction of this Court is invoked under 28 USC 1254(1).

QUESTIONS PRESENTED

I. Whether Robert W. Mitchell and Ronald McDaniel were entitled to have been appointed as Designated Agents for the South Carolina Reinsurance Facility in accordance with SC Code 38-77-590(a) and/or South Carolina Act 166, Section 29?

II. Whether South Carolina Code Section 38-77-590(c), (d), and (f) codified from Act 145 and Act 166 are in total or in part unconstitutional *per se*?

III. Whether the questions of Fundamental Constitutional Guaranty in Robert W. Mitchell's and Ronald McDaniel's complaints, rising out of Acts 145 and 166 and not out of Act 1177, have been properly considered, addressed and adjudicated?

IV. Whether Robert W. Mitchell and Ronald McDaniel, not being appointed because of classifications arising out of Acts 145 and 166, codified as cs 38-77-590(c) and (f)8 were denied equal protection under the 14th Amendment and the 5th Amendment after 101 similarly situated agents were appointed and relatives of designated agents are presently appointed without classification.

V. Whether a class monopoly has been raised by the statute controlling and by the actions and inactions of the Commissioner.

STATEMENT

The facts in this case are based on statute.

In 1974 the State of South Carolina passed into law Act 1177, The Automobile Reparations Reform Act, [herewith Plaintiff's Exhibit 130 referenced at Index] which had as its'

legislative intent to allow any licensed driver to purchase automobile insurance from any insurer of choice.

Regardless of underwriting considerations, the applicant could not be turned down. Rates were kept artificially low by state power, not allowing proper underwriting considerations, rates were inadequate to pay the losses for such risks, even though SC Code specifically requires that the Commissioner, (now Director) make automobile rates adequate to pay losses. The S.C. Legislature recognized that Act 1177 would drive many insurers to leave the State. [see Act 1177, Art IV section 5; and Act 166 under 38-1-140 (C) 3.] (herewith Plaintiff's Trial Exhibits 130 and 136, referenced at Index.)

To somewhat ease the burden imposed on insurers Act 1177 established a state Reinsurance Facility which allowed insurers to cede up to 100% of "pointed" business (those presumed unsafe drivers because of points against their driving record) to the Reinsurance Facility. Additionally, an insurer could cede up to 35% of "unpointed" but unwanted risks to the Reinsurance Facility.

By other statute, losses and loss histories in the Facility could not be used to compile or determine any automobile insurance rates. Consequently, the substantial losses on Facility business has been constant for each of the 22 years of existence. The losses are made up by a "Recoupment Fee" which is added on to every automobile policy written in the state, accessed according to driving record. Over the past 22 years more than 3 billion dollars in recoupment fees have been paid by insurance purchasers, which represents and verifies the inadequacy of the primary rate structure. Even though SC Code demands that the rate be adequate to pay the claims, it never has been followed.

When Act 1177 passed, the legislature recognized that many insurers would not be able to make a profit under such conditions and would leave the state. For that reason, and undoubtedly conscious and aware that the Act challenged the impairment of contracts clause of the Constitution [Art 1 Sect 10] by causing agent contracts and insurance contracts to be canceled , the Legislature provided for insurance purchasers and insurance sellers (agents) in Act 1177, Article VI, Section 6, codified as 38-37-150 to wit:

38-37-150. Survey by Commission to ascertain state of marketing outlets.

Not more than six months after July 9, 1974, or at such earlier time as he deems it necessary by reason of complaints regarding want of access to automobile insurance in particular areas or want of outlets for producers, the Commissioner shall survey the various areas of the state to ascertain if sufficient marketing outlets exist in all areas are available to all producers; and upon his finding that insufficient marketing outlets exist in particular areas or that certain producers have been deprived of a market for risks previously serviced by them, the Commissioner may, after consultation with the Facility, designate one or more insurers to service such areas through agents appointed by them or may designate such producers as agents of any such insurer or insurers. Such arrangements shall include provision for one hundred percent quota share reinsurance through the facility of any automobile insurance policy marketed through such arrangements, at the option of the insurer, and any such reinsurance shall not be subject to the statutory provisions or rules and regulations regarding excessive utilization of the Facility. [The following sentence was added May 19, 1980.] The designation of a producer by the Commissioner shall be transferable to a *qualified* spouse, child, parent, brother or sister of such producer upon the designated producer's death, retirement or incapacity.

[Please note that the word *qualified* was removed in subsequent Acts, therefore there is absolutely no state residence, license, or even competency or integrity requirement on the part of the relative.]

Through SC Code section 38-37-150, Act 1177 thus provided an alternative resource for the impaired contract whether that of an agent or an insured person. There was absolutely no classification of the applying agent in Act 1177. The classification complained of in this case came out of Acts 145 and 166, [Exhibits 135 and 136 referenced at Index] codified as 38-77-590(c) and (f).

It is necessary here to give somewhat of a brief explanation and history of what is known in automobile insurance as the "residual market" to better understand the case at hand.

Automobile insurance that falls into an undesirable category from an underwriting standpoint is called the "residual market", meaning that it is left over. Such a market can be profitable if rates are allowed to be adjusted according to reasonable underwriting considerations. Before Act 1177, the residual market was taken care of by higher rated insurers willing to incur the added risk for profits generated through the higher rates.

Any insurer was able to take an unwanted "risky" applicant to the State-provided residual market mechanism which was then known as the "Assigned Risk Pool". Such insurers, as well as licensed insurance agents who did not have a contract through an insurer could assign or write a policy in the "Pool" system, where it would be assigned variously among all insurers doing business in the State of South Carolina, according to the percentage of volume total of all insurance written in the State.

When Act 1177 passed there were 48 such agents (4 of whom were Black [see page 7 paragraph 4]), who did not have an insurer, who were writing insurance as "Assigned Risk Agents", with no criteria or rule for being allowed to do so except that he or she, a licensed automobile property and casualty agent, no longer had a company through which to place automobile insurance business.

It should be observed here that all 49 other states have such an arrangement for agents placing business in the individual state's residual market mechanism. Each state mechanism follows similar lines, but if the agent is eligible to write automobile business, there is no classification or statutory provision to bar his doing so, *except for the State of South Carolina*, which has raised such statutory classification to the petitioner, unjustified by any legislative intent, compelling state interest or strict scrutiny considerations necessary to deny petitioner's fundamental Constitutional guaranty. [See SC Code Section 38-77-590, Appendix I.]

Under Act 1177 those previous "Assigned Risk" agents were allowed to be designated as an agent or producer for the Reinsurance Facility Designated Insurer (in accord with Act 1177, Article VI, Section 6, codified as SC Code Section 38-37-150). (Please see text *supra*, page 3) The code section allowed these agents, deprived of their Assigned risk earnings mechanism by Act 1177, and any other agent, deprived of an insurer as a result of the insurer removing from the state as a result of Act 1177, to be appointed a "Designated Producer" for the Reinsurance Facility. Agents of any and all of those companies leaving the State as a result of Act 1177 were eligible for appointment and continued to be appointed as Reinsurance Facility Designated Agents.

Many more insurers fled; the Commissioner and his designees have admitted that more than one hundred insurers left the State as a direct result of Act 1177, resulting in, at least *101* agents having subsequently been appointed under Code Section 38-37-150, their credential for appointment identical to that of the petitioner. When the classification imposed by SC Code Section 38-77-590(c) is applied to Mitchell and McDaniel, who are similarly situated, petitioner recognizes this to be an affront to the 14th Amendment. [*Daily v. New Britain Mach. Co.*, 512 A. 2d 893, 200 Conn 562.]

In May, 1980, 38-37-150 was extended by a sentence which allowed transfer to a relative whose only qualification for appointment was first degree blood or marital relationship, similar to the kings of England. This is of a particular concern because the appointment as a designated agent could not be bought or sold except to another Designated Agent. Petitioner could not buy such an agency, but like the devine right of kings, a close relative could have the lifetime appointment transferred to he or she even though they were incompetent, insolvent, insane, in prison, were not licensed to sell insurance or even living or ever lived in the state of South Carolina. [See 38-77-590(f) *infra*.] Petitioner believes this scheme and statute absolutely deferential to Designated Agents and their close kin, preferencing them above the petitioner, to violate the equal protection clause of the 14th Amendment and Article 1, Section 10 of the Constitution. [*Mulkey v Reitman*, 64 Cal 2d 529, 50 Cal Rptr 881, 413 P2d 825, affd 387 US 369, 18 L Ed 2d 830, 87 S Ct 1627] (It is of note here that there is no

locatable citation with regard to granting "of any title of nobility"; however the Court please note the indistinguishable interchange of characteristic between a hereditary nobility and the title of Designated Agent in South Carolina.)

From the start of the Reinsurance Facility system in 1974 until 1985, the historical prospective of the "Designated Agent" was that such appointment had become a very lucrative situation for those appointed. An association of Designated Agents was formed to be protective of their collective interests.

These Designated Agents lobbied for, and the Legislature passed, Acts 145 and 166, primarily designed to restrict and curtail additional Designated Agents from being appointed, and to eliminate or restrain new Designated Agent competition for their total commerce, including the residual market, as well as by now, the total spectrum of automobile insurance, their entry to which total market had been allowed because their rates were more competitive in all areas due to lack of proper underwriting considerations. The Designated Agents lobbied to alter or eliminate the very Code Section that allowed *their* admission to being a Designated Agent, having already added the last sentence to 38-37-150 to allow the unrestricted appointment of their close relatives, [now recodified as 38-77-590(a)] then burning the bridge so no one else in a similar circumstance to their prior condition could cross. Since, because of the structure of the Code, only a Designated Agent can buy a Designated Agency, defeating Fundamental Constitutional guaranty, [please see 16A C.J.S. Constitutional Law at 494] and since only a first degree relative can have a Designated Agency transferred to them, it is conceivable that the whole of the Designated Agencies could be owned eventually by a single family.

Through Act 145, and Act 166, restrictive sections kept agents from appointment by placing 10 years of prior personal ownership of an agency and a large book of business as requirements for appointment. The requirements impacted on all entities not being in business for 10 years, or being able to amass a sizable cedable book of business. The import of the impact is seen when it is noted that there are now 5 Black Designated Agents in South Carolina, the original 4 transferring "Assigned Risk" agents, stated above [see page 5 pp. 3] and only one more, currently appointed,

added since origin. From the prospective of the Black agent, the element of time, social and economic disparities kept him from entering the market earlier. The same prospective applies to the petitioner and any other similarly situated agent.

Petitioner had started a small, one man agency, in a small town (population about 300) where there were no other agents. The environs of the town were fastest growing of the fastest growing county in the state. Petitioner had been an insurance agent for 30 years in various capacities, but the previous employers owned the book of business, therefore he started from scratch in 1986. Soon after Hurricane Hugo, all of petitioner Mitchell's (and McDaniel's) insurers removed from doing business in the state, leaving him (and McDaniel) with no insurer and no means of securing an automobile insurance contract.

Mitchell sought appointment as a designated agent under the former 38-37-150, [which by that time through Act 166 had been recodified as 38-77-590(a), with the same textural wording as the original 38-37-150]. The "transfer to relative" or "nobility" sentence change added in 1980 had become 38-77-590(f).

Upon application, the Commissioner, through his designee, specified that petitioner could not be accepted for appointment unless he met the conditions specified in 38-77-590(c). In doing so the Commissioner ignored the decision in *Mungo v. Smith,* [347 S. E. 2d 514 (S.C. App. 1986], which decision declared:

> **"We first hold that the insurance department had no authority to limit the application of Section 38-37-150 to the designation of agents for "want of access to automobile insurance in particular areas", because Section 38-37-150 clearly sets an alternate reason for the appointment of a producer for the Reinsurance Facility, i.e., the loss of agency contracts with insurance companies as a result of the Insurance Reform Act. As long as agents lose their agency contracts because of the Insurance Reform Act, this last mentioned reason for appointment of producers for the Reinsurance Facility remains viable and we so hold."**

Please note the restrictive barriers of 38-77-590(c) and (f) were inserted into the statute in 1985 through Acts 145 and 166. The decision in *Mungo* was made in 1986, therefore the opinion was and is timely, the opinion states "**as long as** agents lose their agency contracts because of the Insurance Reform Act", [Act 1177] *and not* "until prohibiting classification is inserted into the statute." Certainly Petitioner Mitchell lost his insurers as a direct result of Act 1177. His insurers, as did more than 100 in the time frame under discussion here, left the state because they could not make a profit under the statutes.

Mitchell could not meet the 10 years of ownership or the book of business criteria of 38-77-590(c)(1) and (2). [Please see Appendix I, page 17.] The intervening of the 38-77-590(c) developed a classification toward Petitioner, and deprived him fundamental freedoms: life, liberty and property, as well as the right to do business in a chosen occupation. [16A CJS cs494]

During the same year, 1987, McDaniel 's insurers removed from him, leaving him with no insurer. [Please note here that Mitchell and McDaniel are not affiliated except as individual plaintiffs in the matter at hand, and live and work more than 100 miles apart. The separate cases were joined the Fourth Circuit Court of Appeals.] McDaniel's book of business was sufficient, he having recently prior to the circumstance of insurer's removal purchased a large agency. McDaniel's had owned a large agency for more than 20 years in Virginia before buying the present South Carolina Agency and moving permanently to South Carolina. When McDaniel applied for appointment the Commissioner's Designee would not allow appointment stating that the ownership requirement had to have been accomplished in South Carolina. The statute, however, does not specify that the ownership has to be in South Carolina. By not allowing the record, fixed in another state, to apply to South Carolina, the Constitution of the United States, Article IV, Sections One and Two, was compromised by the Commissioner and his designees. [*Supreme Court of Virginia v. Friedman*, 108 S.Ct. 2260, 487 U.S. 59, 101 L.Ed.2d 56.] (*Silver v. Garcia*, 760 F.2d 33.) *[Barnard v Thorstenn, 109 S.Ct.* 1294, 103 L.Ed.2d 559.]

At the time of application, both Mitchell and McDaniel qualified for appointment under Act 166, Section 29. Section 29 was inserted into Act 166 by the South Carolina Legislative Black Caucus to allow more Blacks entree' into appointment as a Designated Agent, without respect to the barriers imposed by 38-77-590(c), and was open to *all* agents similarly situated, including Mitchell and McDaniel . When they applied for appointment Section 29 was obfuscated from them, not mentioned, pointed to or utilized as was their right for application; hence here both were directly obstructed from Constitutionally fundamental rightful appointment by the Chief Insurance Commissioner of South Carolina, acting under color of state law to defeat them in violation of 42 USC 1983 and 1985. [*Shaw by Strain v. Strackhouse* 920 F. 2d 1135] (*Carter v Sedgewich County, Kan.*, 705 F. Supp 1474, rip vip 929 F. 2d 1501.)

During the three year window of opportunity [from June 4, 1987 through June 4, 1990] for such appointment as specified in Act 166, Section 29, no agent was ever appointed because the Commissioner and his designees claimed ignorance of the statute, therefore did not allow any application or specify to the applicant that such a window of opportunity existed or what it meant to the applicant.

Act 166 Section 29 reads:

> **Section 29. The governing body of the Facility may, for a period of three years beginning on the effective date of this act, designate an applicant who meets all other requirements but is prohibited from writing property and casualty insurance by an insurance company or had a broker agreement or contract with another agency that was licensed to write property and casualty insurance in this State.**

According to Act 166, which was approved June 4, 1987, (Petitioner's Exhibit 136 in the District Court , Indexed herewith), the original statute 38-37-150 was changed and "qualifications" were added. [Bear in mind that neither these nor any other

qualifications apply to relatives appointed or to be appointed according to the sentence added to 38-37-150 in 1980 and which survives presently as 38-77-590(f).] Concurrently, by 1987 Act 155 the code sections applying were changed from 38-37-150 and following to 38-77-590.

REASONS FOR GRANTING WRIT OF CERTIORARI

There are special and important reasons for exercising this Court's discretion to review the decision of The Fourth Circuit Court of Appeals.

1. The questions of Fundamental Constitutional protection raised by the petitioners have never been addressed by the District Court and by the Fourth Circuit Court of Appeals.

The Court declared in *S.C. v. McMaster* 237 US 63, 1915 that:

> "There should be no arbitrary deprivation of life or liberty or spoliation, but that equal protection and security should be given to all under like circumstance in the enjoyment of their personal and civil rights. That no greater burdens should be laid upon any one than are laid upon others in the same calling and condition."

In previous decisions, among them *Parrish v. Lamm,* 758 P. 2d 1356, the Court has determined that:

> "Equal protection cases are subject to three tiered standard of review: classifications that affect suspect class or fundamental right are subject to strict scrutiny which requires government to establish that classification is necessarily related to compelling state interest; classifications based on legitimacy or alienage are subject to intermediate level of scrutiny which requires government to establish that classifications substantially relate to important governmental objective; all other classifications are subject to rational basis standard of

review, which party challenging statute bears burden of proving beyond reasonable doubt that classification is not rationally related to the legitimate government objective."

In the case at hand, strict scrutiny must apply because the fundamental rights of the petitioner have been impaired.

Constitutional, fundamental rights have been elaborated in many ways, but among which elaborations are the right to work and earn a living. These particular rights have been described by the court as valuable, inherent, fundamental, natural, essential, inalienable, one of the privileges of citizenship and is fully protected by fundamental laws. 16A C.J.S. 494 *City of Louisville v. Sebree,* 214 S.W. 2d 248, 308 Ky.420, *State v. Harris,* 6 S.E. 2d 854, 216 N.C. 746, 128 A.L.R. 658, *Bautista v. Jones,* 155 P.2d 343, 25 Cal.2d 746. *Ladson v. Hallihan* 36 N.E. 2d 227, 377 Ill 187. *Reingold v. Harper,* 78 A.2d 54, 6 N.J. 182.

2. The decision of The Fourth Circuit Court of Appeals, made without commentary, was in error because it followed the opinion of the District Court. (A.) The District Court Judge did not mention or consider Acts 145 and 166, [in pertinent part codified as 38-77-590(c) and (f)], nor Section 29 of Act 166. (B.). The finding of fact and conclusions of Law of the District Court applied to other plaintiffs in this case but did not and could not apply to Mitchell and McDaniel. (C.) The District Court applied a stale and inappropriate prior decision not involving strict scrutiny demands to this case. (D.) *Mungo v Smith*, *supra*, page 8 paragraph 3, was not considered, discussed or applied to the matter at hand.

2.(A). The matter at hand is not Act 1177 as the Trial Judge contends. At issue here are the classifications imposed by Acts 145 and 166; as well as Section 29 of Act 166 which the Commissioner refused to act upon for appointment of the petitioner and for McDaniel.

2.(B.) The cardinal point in the Finding of Fact and Conclusions of Law of the Trial Judge applied to the majority plaintiffs, not to Mitchell and McDaniel. The VAR plaintiffs have insurers that they are still writing insurance for, and never have

been without an insurer, therefore, the District Judge rightly concluded as to the VAR plaintiffs, they have no complaint because they have access to the Reinsurance Facility through their insurers. However, Mitchell and McDaniel's insurers have removed from the state as the direct result of Act 1177, leaving these two, only, plaintiffs without an automobile insurer since 1987. Subsequently, due to the classifications imposed by Acts 145 and 166, both have been denied access in any form to the Facility, and unequally denied appointment as Designated Agents.

The Trial Judge states in his opinion:

"....Act 1177 does not place any direct restriction upon an an agent's ability to write automobile insurance."

That may apply to the VAR plaintiffs, but cannot apply to the petitioner and McDaniel, since they have not had an insurer through which to write business since 1987.

2. (C.) [Please see the decisions of the District Court and the affirmation of the Court of Appeals here in Appendix II on page 20.] The District Court depended upon the decision in Prudential Property and Casualty Insurance Company v. Insurance Commission of South Carolina case [699 F. 2d 690, 692 (4th Cir. 1983) disqualify petitioner's fundamental protection claim. The statute that disallows Mitchell's appointment, [38-77-590(c)] was codified from Acts 145 and 166 which were not written until 1985 and 1987, fully 3 years after the Prudential decision, and absolutely none of the language now prohibiting the petitioner was in the South Carolina Statute at the time of the Prudential decision, which could not apply to Mitchell, and, indeed, did not develop the standard of Strict Scrutiny demanded in Mitchell's case which involves fundamental Constitutional guaranty.

In referring to Prudential in his opinion, the District Court Judge declares that the Fourth Circuit Court of Appeals "validated the legality of Act 1177 which is the legislation under scrutiny in the present action." [Please see page 29 Appendix II.] **The statement is not true.** Only the specific section of Act 1177 having to do with restrictions and penalties for an **insurer** ceding business to the facility beyond the allowable limits was at issue in Prudential. The District Judge elaborates on ceding abilities of insurers. These points cannot affect Mitchell and McDaniel since

neither has had an automobile insurer since 1987. Further and more precisely, SC cs 38-77-590(a) under which Mitchell sought appointment, specifically provides in the last sentence that insurance written under such appointment **"is not subject to the statutory provisions or regulation regarding excessive utilization of the Facility."** The Fourth Court of Appeals declared that part dealing with the ceding of business, which cannot apply to Mitchell, to be "purely economic". At the time Prudential was tried there were *no classifications*, because Acts 145 and 166 which forced classification into the Code in 38-77-590(c), were not passed until 3 years later. Prior to Act 145 and 166 no classification was involved because all applying agents were admitted to be designated agents and treated alike under the section of Act 1177 codified as 38-37-150 (recodified 38-77-590(a). Act 1177 treated all **insurers** alike, and ceding limitation was necessary for the administration of Act 1177, serving the purpose of Legislative intent. The Prudential judgment did not validate the legality of the entire Act 1177, which was 40 legislative pages long; but whether it validated the rest of Act 1177 is not material here. It is *Acts 145 and 166* that forced Code Section 38-77-590(c) into the Code. It is a plain and undeniable fact that the carrying out of the legitimate legislative intent of the Insurance Reform Act, Act 1177 of 1974, was not dependent upon the classifications in Acts 145 and 166 of 1985 and 1987, in part particular now codified as 38-77-590(a),(c), and (f). The legislative intent as specified in the plain language of Act 1177 was to allow any licensed driver to purchase automobile insurance from any insurer of choice. That specific legislative intent was carried out without a hitch for more than eleven years, and without the necessity of classification of insurance agents being a necessary requirement to success.

The judgment in Prudential involved economic circumstance, not subject to strict scrutiny; there was no classification because all similarly situated insurers and agents were treated identically under the law. (But no longer. Acts 145 and 166 changed that.) All the case law presented supported classification in economic circumstance. None of it applies here. What is at issue here is a question of Fundamental Constitutional Guaranty.

The point is made that in order for a State to be able to classify a person differently from similarly situated persons under a statute, the classification must be necessary to carry out a legislative intent and the reason must be so compelling that the State must find it necessary to defeat fundamental Constitutional freedoms in order to carry out the legislative intent. The first eleven years of operation of the legislative intent without classification disproves that the classification in 38-77-590(c) was either necessary or compelling. In *Parish v Lamm,* [758 P. 2d 1356] the Court affirmed that

> **"classifications that affect suspect class or fundamental right are subject to strict scrutiny which requires government to establish that classification is necessarily related to compelling state interest."**
>
> [Also C.S.J. Constitiutional Law at 16 82(1)]

The State of South Carolina has not been able to do so. It has been the judgment of this Court that classification among similarly situated persons is unconstitutional unless it is narrowly used to carry out Legislative intent under strict scrutiny standards. **Neither is necessary in the case at hand.**

Finally, it must be addressed that at the close of the trial, the Trial Judge put great emphasis on the fact that Mitchell's Finding of Fact and Conclusions of Law would be considered. When Mitchell determined from the Opinion of the District Court that no reference had been made to his Finding of Fact and Conclusions of Law, (with particular emphasis to Act 145 and 166 and the Mungo case law) a 10e Motion to Supplement the Record on Appeal was made. The motion was denied by the District Court and the Court of Appeals.

2.(D) The District Court did not comment on *Mungo*, which is case specific and statute specific to Mitchell's case. It is imperative that the conflict in the Opinion of the District Court and the Court of Appeals in the *Mungo* opinion be resolved.

3. The question of whether a monopoly has been created by the Acts 145 and 166 have not been answered.

The Trial Judge points out that the majority of automobile insurance is written by Direct Writers. At issue here is not the amount direct writers produce, but the production of the

Designated Agency System. The Designated Agents write 100% of Designated Agent business, from which Designated Agent business, Mitchell has been prohibited from *that* **competition** by the boycott of the Commissioner in not acting on 38-77-590(a) or Act 166 Section 29 to appoint Mitchell, and by enforcing the classification barrier thrown up against his **participation in competition** in the Designated Agency System through 38-77-590(c). *Please note* that abundant case law specifies that legislative acts must be given their plain and ordinary meanings. *State v. Goolsby,278 SC 52, 292 S.E. 2d 180 (1982).*
In the case of 38-77-590(a) the language is plain and the case law established in Mungo v Smith, *Supra,* is direct, yet the Commissioner has refused to appoint Mitchell. *Mitchell has thus been withheld from competition by the power of the State.*

> "'Monopoly power' is the power to exclude competing or control prices." U.S v Syufy Enerprises, 903 F. 2d. 659.
> "It is the nature of competition to make winners and losers and, if there are no significant barriers to entry eliminating competitors will not enable the survivors to reap a monopoly, as any attempt to raise prices above competitive level will result in new competitors, able and willing to offer their commercial or personal services for less, being lured into the market." Id. Northern Pac. Ry Co. v.U.S., 1958, 78 S.Ct. 514, 518, 356 U.S. 1, 5, 2 L. Ed. 2d 545.
> "Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging or stabilizing the price of a commodity in interstate commerce is illegal *per se." US* v Socony-Vacuum Oil Co Inc. 1940-43 Trade Cases 56031 310 US 150 60s ct. 811.
> "Monopoly as prohibited by Section 2 of the Sherman Antitrust Act, has two elements: possession of monopoly power in revelant market and willful accusition or maintenance of that power , as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." US v Grinnell Corp., 384 U.S. 563, 86 S. Ct 1698, 1704, 16L. Ed. 2d 778.
> "It is 'monopolization' in violation of Sherman Antitrust Act for persons to combine or conspire to acquire or maintain

power to exclude competitors from any part of trade or commerce, provided they also have such power that they are able, as a group, to exclude actual or potential competition and provided that they have intent and purpose to exercise that power. Davidson v Kansas City Star Co. D.C. Mo., 202 F Supp. 613, *617.*

CONCLUSION

The facts and statute and case law are compelling that the requested Writ of Certiorari be granted.

Respectfully submitted.

Robert W. Mitchell
Pro Se

August 19, 1998

APPENDIX I

I. South Carolina Code Section 38-77-590

38-77-590. Designated producers.

(a) Not more than six months after July 9, 1974, or at an earlier time as the Commissioner considers necessary by reason of complaints regarding want of access to automobile insurance in particular areas or want of outlets for producers, the Commissioner shall survey the various areas of the State to ascertain if sufficient marketing outlets exist in all areas or are available to all producers. Upon a finding by the Commissioner

arrangements shall include provision for 100 percent quota share reinsurance through the Facility of any automobile insurance policy marketed through the arrangements, at the option of the insurer, and the reinsurance is not subject to the statutory provision or regulations regarding excessive utilization of the Facility.

(b) After the effective date of this section, those producers previously designated by the Commissioner may continue to serve in that capacity under the jurisdiction and control of the governing board of the Facility, except that any change in the rate of commissions allowed designated producers is subject to the Commissioner's approval.

(c) A producer may be designated by the governing board of the Facility upon application for designation and is eligible for designation upon a finding by the governing board that the applicant meets the following qualifications:

(1) The applicant has been, for ten continuous years, a licensed resident property and casualty insurance agent and agency owner or principal with authority from one or more licensed insurers to write liability and physical damage insurance on private passenger automobiles.

(2) At the time of application the applicant is servicing and owns the renewals on private passenger and commercial automobile insurance business, the net premiums on which exceeded seventy-five thousand of potential cedeable automobile insurance during any one of the previous five calendar years preceding the application.

(3) Neither the applicant, nor any employee of the applicant or the applicant's corporate agency, nor any partner or shareholder in any related insurance agency, related premium service company, or related other business, has any direct or indirect connection with any voluntary market outlet for the purpose of writing any type of automobile insurance in this State except for motorcycle insurance and types not cedeable to the facility.

(4) The applicant has not contributed to his termination as agent by any insurer because of any illegal breach of agency agreement or other related, improper, or unethical conduct; and

(5) The books, records and accounts of the insurance business of the applicant have been audited at the expense of the applicant and found by the governing board to be indicative of a financially sound operation.

(d) Prior to designation as a producer, the applicant shall furnish at his expense a bond in an amount of not less than fifty thousand dollars for the faithful performance of the duties as a producer, executed by the applicant as principal and a corporate surety licensed to do business in this State as surety, and shall also have effective errors and omissions insurance by an insurer licensed to do business in this State, with bond and errors and omissions insurance being subject to approval by the governing board.

(e) The governing board shall assign specific location to each producer designated. The governing board shall determine from the commissioner the locations assigned by him to those producers whom the commissioner has designated. Designated producers may not open or maintain any other locations without the written authorization of the governing board; provided, however that an applicant maintaining multiple offices on June 4, 1987, is entitled to maintain two locations as a designated agent which he owned and operated at that time and through which premiums in at least the amount of seventy-five thousand dollars were written. The governing board shall terminate the designation and the commissioner shall revoke all agents licenses of any producer who does not comply with this requirement upon demand by the governing board. Upon termination, the producers expirations on designated business become the property of the facility.

(f) The designation of a producer by the Commissioner or the governing board is transferable to a spouse, child, parent, brother, or sister of the producer upon the designated producer's retirement, incapacity, or death. The duties of a designated producer may be performed by one or more employees of the producer or the producer's corporate agency.

(g) Neither a designated producer, nor any employee of a designated producer or the producer's corporate agency, nor any partner or shareholder in any related insurance agency, related premium service company, or related other business, may have any direct or indirect connection with any voluntary market outlet for the purpose of writing any type of automobile insurance in this State except for motorcycle insurance and types not cedeable to the Facility. The governing board shall terminate the designation of any producer and the Commissioner shall revoke all licenses of the producer and of any other insurance agent and premium service company knowingly involved in this connection. Upon termination, the producer's expirations on designated business become the property of the Facility.

(h) A designated carrier who fails a claims audit shall have no new designated producer assignments until the time it passes a re-audit within a reasonable time prescribed by the governing board. If this carrier fails two claims audits, including a re-audit, within any three year period that carrier is disqualified for renewal of its contract with the facility upon expiration of its existing contract.

APPENDIX II

OPINION OF THE UNITED STATES DISTRICT COURT OF SOUTH CAROLINA, COLUMBIA DIVISION follows at page 21.

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

W. Ray Alexander, Andrew Woodham, Randall Stevens, Jim Graby, Edward L. Reed, Jerry Huckaby, Individually and collectively as Voluntary Agents for Reform, and Ron J. McDaniel and Robert Mitchell,

Plaintiffs

Case No 3 : 93-2054-19
Hon. Julian Abele Cook, Jr.

vs.

Director of the Department of Insurance for the State of South Carolina,

Defendant.
_____/

ORDER

The Plaintiffs in this action are insurance agents in the State of South Carolina, all of whom are licensed to sell private passenger automobile insurance. A majority of these plaintiffs have identified themselves as "Voluntary Agents for Reform" (VAR), 1* which is an unincorporated association whose members are independent insurance agents who work in the voluntary market. These agents have contracts to represent one or more private insurance companies which sell private passenger automobile liability insurance in the State of South Carolina.

*1. The following individuals have been characterized by the Court in this opinion as VAR Plaintiffs: W. Ray Alexander, Andrew Woodham, Randall Stevens, Jim Graby, Edward L. Reed, Jerry Huckaby, Steve Creech and Tommy Gosski.

In their complaint, which was filed on August 13, 1993, the VAR Plaintiffs contend that their constitutional rights under the Equal Protection Clause of the United States Constitution were violated by the promulgation and implementation of S.C. Code Ann. cs 38-77-590(c) and (g) by the State of South Carolina, through its agent, the Director of the Department of Insurance (Director of Insurance). It is their fundamental position that these statutory provisions are impermissibly discriminatory, in that they have (1) effectively prevented each of them from successfully competing in the private passenger automobile insurance market on an equal basis with another group of agents who are collectively known as Designated Agents, and (2) unjustifiably extended an exclusive governmental privilege to this challenged group of agent-competitors. Thus, they seek to secure some form of declaratory relief which, in their opinion, would give them the same governmental privileges and business opportunities as the Designated agents.

Another Plaintiff, Ron J. McDaniel, seeks to obtain a declaratory judgment as well as an award of compensatory and punitive damages that were sustained as the result of an administrative by the Director of Insurance; to wit. the denial of direct access to the State Reinsurance Facility (SCRF).

The claims of the remaining Plaintiff, Robert W. Mitchell, who appeared without benefit of counsel, are contained in a forty-five page document which was filed with the Court on May 26, 1995; to wit, "Motion to Amend Proposed Amended Complaint and Amended Complaint of Robert W. Mitchell and Motion for Summary Judgment." While concurring with the claims of McDaniel and the VAR Plaintiffs, he also asserts that the South Carolina Legislature has created an unconstitutional classification of insurance agents by enabling the Designated agents to have direct access to the SCRF while denying a similar opportunity to other licensed insurance agents.

According to Mitchell, the State of South Carolina, through its Director of Insurance, has violated his constitutional rights in that it has (1) created a monopoly by the application and enforcement of certain insurance regulatory statutes, in violation of the Sherman Act and the McCarren Act, and (2) improperly encroached upon his civil rights protected by 42 U.S.C. cs 1983.

In addition to seeking declaratory relief, Mitchell asks for injunctive relief which, if granted, would obligate the Department of Insurance to (1) authorize him and other similarly situated insurance agents to have direct access to the SCRF, and (2) promulgate a self-sustaining SCRF rate without a recoupment fee.

After presiding over the trial of this matter without a jury, carefully considering all the evidence, and studying the applicable law, this Court makes the following findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52. To the extent that any of the following findings of fact constitute conclusions of law, they are adopted as such, and to the extent that any conclusions of law constitute findings of fact, they are so adopted.

Findings of Fact

1. Subsequent to the enactment of the South Carolina Motor Vehicle Safety Responsibility Act in 1952, the legislature, (General Assembly) has utilized two separate and distinct market systems, each of which are designed to insure financial responsibility for any liability that may be imposed upon those persons who operate motor vehicles on the public roads within the State. Between 1952 and 1974, the State enforced the South Carolina Automobile Assigned Risk Plan (SCARP) which authorized an automobile insurer to refuse to write an applicant for insurance. 2* (denotes footnotes) Upon such refusal, the applicant's request for insurance coverage was transferred to the SCAARP. In turn, the applicant's application was assigned to a licensed insurer under a planned rotation.

2. When extensive studies by the General Assembly revealed wide-spread public dissatisfaction with the SCAARP, the General Assembly abolished SCAARP and promulgated the South Carolina Reparations Reform Act of 1974 (Act 1177), which established a new statutory plan for private passenger automobile property and casualty insurance coverage.

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*2 The phrase, "write insurance" is a term of art which refers to the processing of an insurance application. Thus, a refusal to "write insurance" means - in pragmatic terms - that the applicant's request to obtain insurance coverage was rejected by an agent or an insurer

3. Act 1177 altered several aspects of the South Carolina automobile insurance system in the following manner:

A. Among other things, this statute created a "Mandate to Write" requirement which obligated every automobile insurer within the State to provide private passenger auto insurance to all qualified applicants on a non-discriminatory basis. Under the terms of this provision, an unwarranted refusal to issue a policy to any qualified applicant subjected the agent, the insurance company or both to administrative disciplinary action.3*

B. In an effort to prevent discrimination in automobile insurance coverage, the SCRF was created by the General Assembly in order to accommodate the losses that were created by those members of the driving public who were viewed by private insurers as high risks. These losses have been characterized by the insurance industry as the "residual market." 4.*

Under the legislative provisions of the SCRF, private carriers were allowed to direct a portion of their automobile insurance business to the SCRF (up to thirty five percent without penalty), and any losses by the SCRF would be recouped through the assessment of a fee to the insurance bill of every driver in the State.

C. The General Assembly feared that, despite having the opportunity to cede a percentage of their business to the SCRF, some insurance carriers, who would be unable or unwilling to accept the considerable risk that would be placed upon them by the statutory Mandate to Write obligations, would remove their business out of South Carolina and leave many drivers within the State without insurance and several independent insurance agents without a company for whom to write.

In anticipation of this potential problem, the General Assembly authorized the Director of Insurance to designate certain insurance companies, (to wit "servicing carriers") to issue automobile insurance policies which could be written upon their

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3*. The "Mandate to Write" language appears in S.C. Code cs 38-77-110, and is given effect in cs cs 38-77-910 and 38-77-940. 4.* The residual market is a term which describes an undesirable portion of insurance business that the

companies are reluctant to insure because, in their opinion, it constitutes and unacceptably high risk of loss.

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own approved insurance policy contract forms, and underwritten exclusively by the SCRF. 5.*

Under Act 1177, the General assembly also made provisions for the appointment of certain insurance agents as "Designated Agents" if the Insurance Commissioner determined, inter alia, that there was a market need for vehicle insurance in a particular geographic region of South Carolina.

An addition, the statute authorized the Insurance Commissioner (now the SCRF) to designate an insurance agent as a designated agent if it was determined that he/she had been deprived of a sales market that had been previously serviced by him / her. However, there are certain statutory qualifications which must be satisfied before one becomes eligible for an appointment as a Designated Agent. 6.* Initially, there were approximately forty eight Designated Agents, all of whom had been agents who had (1) written exclusively for the Assigned Risk pool which was abolished by Act 1177 or (2) had otherwise lost their sales market by virtue of the enactment of the statute in 1974. 7.*

4. Voluntary insurance companies market their policies through two separate mechanisms. "Direct writers" sell automobile insurance through their own agents. Other voluntary insurance companies market their insurance policies through independent agents, such as the Plaintiffs in this case, who may represent one or more companies on a commission basis. Direct writers and other voluntary companies have the same access to the SCRF. However, both classifications of insurance agents are subject to the same thirty five percentage cessation limitation.

5.* All of the servicing carrier's business is ceded into the Reinsurance Facility.

6.* Section 38-77-590(c) provides: [please see App. I *supra.*]

7.* According to the record, there were 175 designated agents in South Carolina at the time of the trial

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5. Since voluntary companies can cede only thirty five of their automobile insurance risks to the SCRF, independent agents are sometimes discouraged from writing large amounts of automobile insurance, even though their companies are required to accept all applications pursuant to the "Mandate to Write" provision within the statute. On the other hand, the Designated Agents do not experience the same pressure because the servicing carriers can cede the totality of their automobile business into the SCRF.

6. Designated agents may have a private contract to sell other types of insurance as well. However, independent agents are not allowed to become Designated Agents if they also have a private contract to sell other types of insurance.

7. Of the total volume of automobile written in South Carolina, approximately seventy percent of the business is written by Direct Writers. Approximately sixteen percent of the automobile insurance is written by Designated Agents and nearly fourteen percent is written by independent agents through the companies they represent.

8. Ron J. McDaniel is an independent insurance who was initially licensed to sell insurance by the State of Virginia in 1968. In 1987, he purchased an existing insurance agency in Ridgeland, South Carolina which represented United States Fidelity and Guaranty (USF&G), an insurance that wrote automobile insurance in South Carolina. Two weeks after he acquired this agency, USF&G notified him that his authorization to represent the company was terminated. As a result of this unilateral decision, McDaniel and his agency were without a company through which to write automobile insurance. His subsequent efforts to become a designated agent were rejected by the Department of Insurance and the SCRF because he did not meet the statutory requirements of cs 38-77-590(c).

9. Robert Mitchell has previously applied for appointment as a designated agent pursuant to 38-77-590(a) and (c). However, as in McDaniel's case, his applications were denied.

Conclusions of Law

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides that "No state shall . . . deny to any person within its jurisdiction the equal protection of the law.

As a general, the Equal Protection is a constitutional guarantee that government shall deal with similarly situated individuals in a similar manner. When the government finds it necessary to classify similarly situated individuals, the Equal Protection Clause is a constitutional commitment that those classifications will not be based upon impermissible or arbitrary criteria. The United States Supreme Court has adopted three standards that should be utilized by the courts when analyzing a challenge to a government classification on the basis of an Equal Protection argument.

The most rigorous standard employed by the Court is "strict scrutiny" test. In such cases the court gives no deference to the decisions of other branches of government, and makes an independent determination of whether the challenged classification is narrowly tailored to achieve a compelling end. See McLaughlin v. Florida, 379 US 184, 85 S.Ct. 283, 13 L. Ed. 2d 222 (1964). This standard is utilized when (1) the legislation under scrutiny classifies people in terms of their ability to exercise a fundamental right and (2) the governmental classification distinguishes between persons in terms of any right on a "suspect basis," such as race, national origin or alienage. Korematsu v. United States, 323 U.S. 214; 216, 65 S.Ct. 193, 194, 89 L.Ed. 194 (1944). United States v. Carolene Products Co., 304 U.S. 144, 152 n. 4, 58 S. Ct. 778, 783-84, n. 4, 82 L. Ed. 1234 (1938)

An intermediate standard of review has been applied to the classifications that are based upon factors as gender or illegitimacy. To uphold such a classification, the court must find that the classification has a "substantial relationship" to an important governmental interest. See Mississippi University for Women v. Hogan, 458 U.S. 718, 102 S Ct. 3331, 73 L. Ed. 2d 1090 (1982).

The third standard of review, which is applicable in this case, is the "rational relationship" test. This standard is most often utilized when the court considers challenges to legislation that is based on economic classification. When applying this standard,

the courts have upheld the legal efficacy of the challenged legislation unless there are no reasonably conceivable sets of facts that could establish a rational relationship between the classification and an arguably legitimate end of government. Hodel v. Indiana, 452 U.S. 314, 331, 101 S. Ct. 2376, 2387 (1981). Economic legislation carries a presumption of rationality that only be overcome by a clear showing of arbitrariness and irrationality. Id.

In Federal Communications v. Beach Communications Inc., 508 U.S. 307, 113 S.Ct. 2096, 121 L. Ed. 2d 532 (1993), the Court upheld the validity of a statute that regulated cable television, facilities which served separately owned buildings but exempted those facilities that served one or more buildings under common ownership. The Court stated:

> Those attacking the rationality of the legislative classification have the burden to negate every conceivable basis which might support it. . . . Moreover, because we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature. . . in other words, a legislative choice is not subject to courtroom fact finding and may be based on rational speculation unsupported by evidence or empirical data.

113 S. Ct. at 2102. See also Personnel Administrator of Massachusetts v Feeny, 442 U.S. 256, 99 S. Ct. 2282, 160 L. Ed. 2d 870 (1979) (State statute giving preference for state civil service to veterans upheld despite plaintiffs' argument that preference had dramatic economic impact on women since ninety eight percent of Massachusetts veterans were male); Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 98 S. Ct. 2207, 57 L. Ed. 2d 91 (1978) (Equal protection challenge to state law prohibiting petroleum producers and refiners from owning, retail gas stations rejected).

In the The Prudential Property and Casualty Insurance Co. v. Insurance Commission of South Carolina, 699 F. 2d 690, 692 (4th Cir. 1983), the Fourth Circuit Court of Appeals validated the

legality of Act 1177 which is the legislation under scrutiny in the present action:

> As long as this statutory scheme bears a rational relationship to a permissible state objective, it withstands any attack on equal protection grounds. Certainly it is permissible for a state to guarantee adequate insurance coverage for all drivers. It is also clear that the establishment of the [SCRF] and its cessation requirements, which are designed to discourage overutilization by any one insurer, bear a rational relationship to this legitimate state goal.

Id.

> There can be no dispute that the regulation complained of in this case [Act 1177] is purely economic, involving no suspect classification or fundamental freedom. Therefore, it need bear only a rational relationship to a permissible state objective and will not be set aside if any facts may be conceived to justify it. Clearly, there is a permissible state objective inherent in this legislation. It is designed to make certain that automobile insurance will be available to all drivers and that, conversely, the establishment of the [Reinsurance] Facility, and the promulgation of the contested Plan of Operation, bears a rational relationship to that goal.

The Prudential Property and Casualty Company v. South Carolina Department of Insurance, et al. 534 F. Supp. 571, 576 (D.S.C. 1982) aff'd. 699 F. 2d 690 (4th Cir. 1983).

In the present case, the Plaintiffs contend that Act 1177 violates the Equal protection because it allows servicing carriers to cede one hundred percent of their automobile insurance business into the SCRF, while private carriers are only allowed to cede thirty five percent. They maintain that this policy has resulted in a situation in which private carriers place pressure on them, as independent agents, to limit their automobile insurance business. By contrast, the Plaintiffs point out that all of the Designated agents are unfairly authorized to write automobile insurance on an unlimited basis because their servicing carriers cede all of the business into the SCRF.

First, it is the insurance company, not the agent that has access to the SCRF. Thus, Act 1177 does not place any direct restriction upon the agent's ability to write automobile insurance. In fact, the statute mandates that all qualified applicants for automobile insurance be accepted, regardless of the level of risk that has been incurred by the insurance company. Thus, not only do the agents have the ability to write automobile insurance, they are required by law to do so for any qualified person who enters their office. Any act of discouragement of an agent from writing automobile insurance by a company constitutes a violation of the law. While the pressure upon insurance agents to avoid automobile business may be the result of companies' reaction to Act 1177, it does not constitute a violation of the Equal Protection Clause by the State of South Carolina or any of its representatives." *8.

Second, the inquiry of whether the cessation requirements in Act 1177 are rationally related to the goals of the legislature must be answered in the affirmative. The legislative purpose of Act 1177 was to make automobile available to all citizens on a non-discriminatory basis. In order to accomplish this purpose, the legislature imposed a requirement on insurance companies to write all insurable persons who file an application for coverage. Foreseeing the genuine potential for the removal of insurance carriers from the State due to the compulsory policy, the legislature also provided for servicing carriers who would replace some of the companies who chose to leave. As a result, these servicing carriers are allowed to cede one hundred percent of their automobile business into SCRF, which underwrites the risks with a recoupment fee that is charged to licensed drivers in the State. Private companies may cede thirty five percent of their automobile insurance. In addition, the statute provided for the continued

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8* It is significant to note that seventy percent of the automobile business is written by direct writers, whose companies also cede only thirty five percent of their risk to the SCRF.

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employment of those agents, who are adversely affected by the out-of-state flight of their companies, through the creation of the

Designated Agent position. The disparity in the amount that may be ceded by private carriers and servicing carriers is intended to protect the SCRF against overutilization. Thus, the record in this cause strongly suggests that the cessation requirements within Act 1177 further the goal of creating a nondiscriminatory insurance scheme in the State of South Carolina. *9.

Arguably, the legislative classification in Act 1177 may have produced an unintended inequality. However, this classification does not violate the Equal Protection Clause because (1) it does not direct result in the injury, about which the Plaintiffs complain, (2) it does prohibit companies from rejecting qualified automobile insurance applicants, and (3) it bears a reasonable and rational relationship to the goal of the State of South Carolina which is designed to prevent an overutilization of the SCRF. The Supreme Court in Dandridge v. Williams, 397 U.S. 471, 90 S.Ct. 1153, 25 L. Ed.2d. 491 (1970) opined:

> In the area of economic and social welfare, a state does not violate the equal protection clause merely because the classification made by its laws are imperfect. If the classification has some 'reasonable basis' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' *Id.*, quoting Lindsley v. Natural Carbonic Gas Co., 220 US 61, 78, 55 L.Ed. 369, 337, 31 S. Ct. 337. The claimed imperfections of Act 1127, (*) as view by the Plaintiffs, do not render it unconstitutional. The extent to which the statute has resulted in improper pressures to avoid the execution of automobile insurance contracts, as noted above, is an issue that should be resolved between the insurance companies and their agents.

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*9. The plaintiffs maintain that there is no evidence to suggest that allowing equal access to the SCRF would cause overutilization. Howwever, it is not the Defendant's burden to prove that overutilization is a legitimate concern or that this concern actually motivated the legislature. Rather, it is upon the plaintiffs to negate every conceivable basis upon which the challenged legislation was promulgated. Federal Communications Commission v. Beach Communication, Inc. 508 U.S. 307, 113 S

Ct. 2096, 121 L. Ed. 2d 532 (1993). The plaintiffs in this case have not shown that this is not a conceivable legitimate basis upon which to limit the cessation ability of private carriers.

In summary, the Court finds that the cessation requirements of Act 1127 (*) are constitutional and do not violate the Equal protection Clause of the United States Constitution. Thus, a judgment shall be entered in favor of the Director of Insurance and against the VAR Plaintiffs and the Plaintiff, Ron McDaniel.

The Court also finds that the claims of pro se Plaintiff, Robert Mitchell, to be without merit. In addition to a claimed violation of the Equal Protection Clause, Mitchell contends that Act 1177 (1) allows the Director of Insurance to boycott him in violation of 42 U.S.C. 1983 and 1985, and (2) allows the establishment, performance and continuance of a monopoly in the system of automobile insurance in South Carolina in violation of the Sherman Antitrust Act and the McCarren-Ferguson Act. A review of the entire record in this cause reveals that he has failed to produce any evidence which would support the contention that the State of South Carolina violated any of his fundamental constitutional rights. Furthermore, there is no competent evidence that Act 1177 has created a monopoly in the automobile insurance system within the State, as alleged by Mitchell. To the contrary, the evidence presented in this case suggests that the majority of automobile insurance is written by Direct Writers, all of whom are subject to the thirty five percent cessation limitation rule.

In summary, the Court finds that Mitchell has submitted an insufficient amount of proof to support his claims in the case at the bar. Hence, a judgment will be entered in favor of the Director of Insurance and against the Plaintiff, Robert Mitchell.

IT IS SO ORDERED.

Julian Abele Cook, Jr.
United States District Court

Dated: 5-13-97

*Exact copy, assumes "1177"

Beaufort, South Carolina

Unpublished

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 97-2283

ROBERT W. MITCHELL Plaintiff-Appellant

and

RAY W. ALEXANDER; THOMAS ALEXANDER; ANDREW WOODHAM; DUDLEY HORTON; PAUL DURBAN; HARRY WEEKS; HENDRY PENDER; ARTHUR BRUCE; WILLIAM THOMASON; MARSHALL KEYS; JOHN MCCAIN; MARY JACK JONES; NICHOLAS HART; MAYNARD D. BARKER; JACK HOVER; C. HARRINGTON BISSELL; HENRY H. LOWNDES, JR.; GEORGE HAMRICK; THEODORE T. MAPPUS ; DOUG COUSAR; HAROLD ISEMAN, JR.; LINDA K. WINGARD; PAUL STEADMAN; LAWRENCE HURSEY; SAM BETHEA; WILLIAM REEL, JR.; JOHN N. CROUCH, JR.; FRED JONES; ROBERT ODOM, JR,; JAMES VERNON EPPS; BETTY ELLIS; BILLY ABERCROMBIE; LLOYD KESSLER; JOHN BURNETT; T. PARRISH; A.L. VOSS; JOE SULLIVAN; LAURENS I. JAMES, JR.; ED BRASHER; AL HENDERSON, JR.; COLEMAN BOWIE; E.P. ELLIS JR.; PAUL NANCE; RAYMOND L. SESSIONS; RON J. MCDANIEL; BOBBY KENNEDY; L. VICTOR JOWERS, JR.; HENRY WILLIAMS; JERRY B. MILES; RANDALL STEVENS; RICHARD TIDWELL; JIM GRABY; DICK LINDSAY; CHARLES MIDGLEY; REAVES GASQUE; BILLY COX; TRENT K. PURCELL; ROBERT SUMMER, JR.; Z.T. ABBOTT, JR.; REMBERT SINGLETARY; EDWARD L REED; HARRY

WANNAMAKER, III; JERRY HUCKABY; O WAYNE STONER; G.A. WEATHERSBY, II; CHARLES DORTON; JOHN SADLER; ROBIN A SMOAK; WILLIAM HILLELR; CINDY CROWLEY; THOMAS CUTINO; DICK LEE; STEVE CREECH; TOMMY GOSSKI; CLARKE BYNUM; MIKE WATSON; MILIE M. DUDLEY; TED WELCH; JOHN GILL ; HIRAM HUTCHINSON; FLOYD ALLISON, individually, and collectively as Voluntary Agents for Reform, an unincorporated association,

verses

DIRECTOR OF THE DEPARTMENT OF INSURANCE FOR THE STATE OF SOUTH CAROLINA

Defendant-Appellee

No. 97-2360

RON J. McDANIEL,

Plaintiff-Appellant,

and

RAY W. ALEXANDER; ROBERT W. MITCHELL; THOMAS ALEXANDER; et al. individually, and collectively as Voluntary Agents for Reform, an unincorporated association,
Plaintiffs

verses

JOHN G. RICHARDS, in his capacity as Chief Insurance Commissioner, Defendant-Appellee

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Appeals from the United States District Court for the District of

South Carolina, at Columbia. Julian Abele Cook, Jr., Senior District Judge, sitting by designation. (CA-93-2054-3-19)

Submitted: March 31, 1998 Decided: April 20, 1998

Before MURNAGHAN and WILLIAMS, Circuit Judges, and Hall, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Robert W. Mitchell, Ron J. McDaniel, Appellants Pro Se. William Llewellyn Pope, POPE & ROGERS, Columbia, South Carolina, Lee Peter Jedziniak, STATE OF SOUTH CAROLINA DEPARTMENT OF INSURANCE, Columbia, South Carolina, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Appellants appeal the district court's orders entering judgment in favor of the Defendant following a hearing and denying their motions for reconsideration. We have reviewed the record and the district court's opinions and find no reversible error. Accordingly, we affirm the reasoning of the district court. Mitchell v. Director, Dep't of Ins.; McDaniel v Richards, CA-9302054-3-19 (D.S.C. May 13 & Sept. 16, 1997). Mitchell's motion to supplement the record is denied. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

Filed
May 26, 1998

No. 97-2283
CA-93-2054-3-19

Robert W. Mitchell

Plaintiff - Appellant

and

Ray W. Alexander, Thomas Alexander et. al.
and Ron McDaniel,

Plaintiffs

v.

Director of The Department of Insurance for the State of South Carolina

Defendant - Appellee

Ron J McDaniel

No.97-2360
CA-93-2054-3-19

Plaintiff - Appellant

and

Ray W. Alexander, et al.

Plaintiffs

versus

John G. Richards in his capacity as Chief Insurance Commissioner.

On Petition for Rehearing with Suggestion for Rehearing in Banc

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The appellants' petition for rehearing and suggestion for rehearing in banc were submitted to this court. As no member of this Court or panel requested a poll on the suggestion for rehearing in banc; and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggest ion for rehearing in banc are denied.

For the Court

/s/ Patricia S. Connor
CLERK